

1986

# The State of Utah v. Casey Neal Sweat : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
CASEY NEAL SWEAT,	:	Case No. 20718
Defendant/Appellant	:	Category No. 2

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REPLY BRIEF OF APPELLANT

Appeal from a conviction and judgment of Burglary, a Second Degree Felony, in violation of Utah Code Ann. §76-6-202 (1953 as amended), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable John A. Rokick, Judge, presiding.

**UTAH SUPREME COURT  
BRIEF**

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REPLY BRIEF OF APPELLANT

The Statement of the Case and Statement of Facts are as set forth previously in Appellant's Brief (Brief of Appellant at 1-2). The Appellant takes this opportunity to reply to the Respondent's Brief.

ARGUMENT

THIS APPEAL IS PROPERLY BEFORE THIS  
COURT AND THE TRIAL COURT ERRED IN  
CONSIDERING ALLEGATIONS OF SEXUAL  
MISCONDUCT IN IMPOSING SENTENCE.

The Appellant in his opening brief contended that the trial court erred in considering allegations of sexual misconduct contained in the presentence report in imposing sentence. The allegations were unsupported and uncharged. No effort was made by the court or the prosecution to substantiate the allegations. The Appellant was prejudiced by the inclusion of the allegations in the report because without the allegations, the Appellant may have received probation or commitment to a treatment program.

In response to this contention the State, in its brief, has asserted that the appeal should be dismissed for procedural reasons

(Respondent's Brief at 3-6) and that the trial court's reliance on the allegations would have been proper or, at the worst, harmless error (Respondent's Brief at 6-15). As will be shown below, the State's first assertion is groundless and the second assertion is meritless.

A. THIS APPEAL SHOULD NOT BE DISMISSED  
FOR PROCEDURAL REASONS.

In arguing that this Court should not reach of the merits of this appeal, the State first claims that a specific and timely objection was not made in the district court (Respondent's Brief at 3). In fact, even a cursory examination of the transcript of the sentencing proceeding reveals that fully one-half of that proceeding involved a discussion between the attorneys and the judge concerning the propriety of the inclusion of the uncharged allegations in the presentence report. (T.2-5) (Addendum A).

Specifically, the following exchange occurred at the beginning of the proceedings:

THE COURT: Is there any legal reason, Ms. Carter, that sentence should not be imposed?  
MS. CARTER (Attorney for Defendant): I'm not sure if it's a legal reason, Your Honor, but Casey mentioned this to me the other day and I forgot. He brought it up. He's willing to take a polygraph test if that would aid the Court in making the decision as to what to do with him. I know there is quite a discrepancy between what the victim said and what Casey said. (T.2)

Further, the following was stated:

MR. BLAYLOCK (the Prosecutor): About the only thing I could, Your Honor, I think we'll submit it on the 90-day evaluation with the recommendation.

MS. CARTER: Your Honor, let me raise this then as a legal issue for the Court to rule on.

I am concerned about the information the Court is receiving as to circumstances that do not relate to a burglary charge. Now, I realize that they may fall under a category of the total circumstances of what occurred, but I am concerned about the Court receiving really hearsay statements from the County Attorney's Office as to other allegations of misconduct that Casey did not plead to, and then considering those in terms of sentencing, that is clearly what the 90-day evaluation people did as well.

So, I would raise that to the Court. I'm not quite sure how to couch it, but it seems to me that it is not really possible for us except to verbally now rebut any of that or state what Casey recalls happening. So, I would raise that as an issue to the Court. (T.3-4)

Both counsel were plainly discussing the erroneous allegations contained in the presentence report. In fact, immediately following this exchange, the prosecutor discussed at some length why the court should consider all of the presentence report in making the sentencing decision (T.4-5). Finally, defense counsel stated that Mr. Sweat "does not believe that he did any of the sexual misconduct that has been alluded to in the presentence report." (T.6)

In State v. Leseley, 672 P.2d 79 (Utah 1983), this Court noted that the purpose of a timely and specific objection was to alert a trial court to problems concerning the admissibility of evidence so that the court will have the "opportunity to avoid error." Id. at 82. In this case, a thorough reading of the transcript can only lead to the conclusion that the trial court was made fully aware of the problems with the presentence report and was



given ample "opportunity to avoid error."

The State further claims that this appeal should be dismissed because "nothing in the record suggests that the district court rejected any defense argument or relied upon information which defendant sought to exclude." (Respondent's Brief at 5). In fact, the record undermines this statement. Just before imposing sentence, the trial judge stated:

THE COURT: Well, taking all of the considerations, taking everything into consideration I don't see any legal reason why sentencing cannot be imposed at this time. Therefore, I'm going to impose sentence as follows: . . . (T.7)

The district court relied on the entire 90-day evaluation/presentence report in imposing sentence. The State's claims that the appeal should be dismissed on procedural grounds are clearly unsupported by the record.

B. THE TRIAL COURT ERRED IN CONSIDERING  
ERRONEOUS, UNSUBSTANTIATED ALLEGATIONS  
OF SEXUAL MISCONDUCT IN IMPOSING  
SENTENCE.

The State's brief lists two substantive reasons why the Appellant's sentence was properly imposed. First, the State asserts that the district court would have committed no error in considering all of the information in the presentence report including the allegations of sexual misconduct. (Respondent's Brief at 6-13). In presenting this assertion, the State relies on several cases which it says stand for the proposition "that a sentencing judge may consider evidence that is extraneous to the precise allegations or offenses set forth in the charging document." (Respondent's

Brief at 6). However, not one of the cases cited by the State states that a sentencing court may rely on unfounded, uncharged allegations of criminal misconduct in imposing sentence.

The State can produce no case which counters the contention outlined in Appellant's Brief that the accused is entitled to have a judge rely on accurate information in imposing sentence.

(Appellant's Brief at 4). Indeed, in State v. Lipsky, 608 P.2d 1241, 1249 (Utah 1980), this Court stated: "The fair administration of justice at the least requires that the information upon which the judge relies in imposing punishment is accurate." This position was reaffirmed in State v. Howell, 707 P.2d 115, 118 (Utah 1985), in which this Court stated: "The due process clause of Article I, Section 7 of the Utah Constitution, requires that sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing sentence." Any sentence which is based, in part, on unreliable information must be remanded. United States v. Needles, 472 F.2d 652 (2nd Cir. 1973); United States v. Weston, 448 F.2d 626 (9th Cir. 1971); State v. Gibson, 681 P.2d 1 (Idaho App. 1984).

In this case, the presentence report contained allegations of significant sexual misconduct on the part of Mr. Sweat. However, the allegations were in the form of unsubstantiated, second hand reports from the victim who took several days to report the alleged sexual misconduct. The allegations were apparently insufficient to support the instigation of criminal charges. (Appellant's Brief at 5-7). Such unsubstantiated claims are far from the "accurate

information" envisioned by Lipsky and Howell.

Finally, the State asserts that even if the trial judge improperly relied on the erroneous allegations, such reliance constituted only harmless error. (Respondent's Brief at 13-15). One need look no further than the presentence report itself to see that such reliance by the judge would be anything but harmless. The presentence report investigator recommended commitment to the Utah State Prison. (Appellant's Brief, Addendum A at 9). Immediately proceeding this recommendation is a discussion of the defendant's "sexual attacks upon the elderly woman." Id. On the other hand, a psychologist, who had no knowledge of the sexual misconduct allegations, recommended that the defendant be placed in a substance abuse treatment facility. (Appellant's Brief, Addendum D at 2). Clearly, the judge's reliance on the erroneous allegations led him to the conclusion of the presentence report investigator rather than the conclusion of the psychologist. The Appellant was obviously harmed by such a conclusion.

Sentencing in felony cases in this state can result in the second-most severe penalty that a state can impose--deprivation of an individual's liberty for a significant length of time. Only the penalty of death is more severe. In light of the severity of the penalty, the issue in this case is simple: Should this Court require a sentencing judge to act only on information that is accurate, reliable, and trustworthy? The alternative is to allow a judge to impose sentence based on innuendo, rumor, and falsehood. To allow the latter would gut the notion of due process at the

sentencing phase of a criminal proceeding.

CONCLUSION

Because of the trial court's misplaced reliance on unsubstantiated allegations contained in the presentence report, the Appellant requests that this Court remand his case for redetermination of his sentence.

Respectfully submitted this \_\_\_\_\_ day of March, 1986.

\_\_\_\_\_  
CURTIS C. NESSET  
Attorney for Appellant

CERTIFICATE OF DELIVERY

I, CURTIS C. NESSET, attorney for appellant, hereby certify that four copies of the foregoing Reply Brief of Appellant have been delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this \_\_\_\_\_ day of March, 1986.

\_\_\_\_\_  
CURTIS C. NESSET  
Attorney for Appellant

Delivered by \_\_\_\_\_ this \_\_\_\_\_ day of March,  
1986.

## ADDENDUM A

1 SALT LAKE CITY, UTAH; MONDAY, MAY 13, 1985; 9:00 A.M.

2 P R O C E E D I N G S

3 THE COURT: STATE OF UTAH VERSUS CASEY  
4 NEAL SWEAT, CR 85-113.

5 THE DEFENDANT IS PRESENT AND REPRESENTED BY  
6 MS. CARTER AND THE STATE OF UTAH IS REPRESENTED BY MR.  
7 BLAYLOCK.

8 THIS IS THE TIME SET FOR SENTENCING IN THIS  
9 MATTER.

10 IS THERE ANY LEGAL REASON, MS. CARTER, THAT  
11 SENTENCE SHOULD NOT BE IMPOSED?

12 MS. CARTER: I'M NOT SURE IF IT'S A  
13 LEGAL REASON, YOUR HONOR, BUT CASEY MENTIONED THIS TO ME THE  
14 OTHER DAY AND I FORGOT. HE BROUGHT IT UP. HE'S WILLING TO  
15 TAKE A POLYGRAPH TEST IF THAT WOULD AID THE COURT IN MAKING  
16 THE DECISION AS TO WHAT TO DO WITH HIM. I KNOW THERE IS  
17 QUITE A DISCREPANCY BETWEEN WHAT THE VICTIM SAID AND WHAT  
18 CASEY SAID.

19 AS I EXPLAINED TO THE COURT IN CHAMBERS, I AM  
20 VERY CONCERNED ABOUT IT BECAUSE WE DIDN'T DO THE PRELIMINARY  
21 HEARING. WE DIDN'T HAVE THAT INFORMATION AT THAT TIME AND  
22 I WOULD NOT ADVISE CASEY TO CHANGE WHAT WE HAVE DONE HERE.  
23 I DON'T KNOW WHETHER HE HAS ANY DESIRE TO DO THAT. THAT WOULD  
24 NOT BE MY ADVICE TO HIM.

25 HE DID MENTION TO ME SEVERAL TIMES DURING THE

1 PAST WEEK THAT HE WOULD BE WILLING TO TAKE A POLYGRAPH TEST  
2 IF THE COURT ORDERED IT.

3 THE COURT: WELL, THE COURT WOULD NOT  
4 ORDER SUCH A TEST IN VIEW OF THE FACT THAT A GUILTY PLEA  
5 HAS BEEN ENTERED. THAT WOULD MEAN THAT A MOTION WOULD HAVE  
6 TO BE FILED TO SET ASIDE A GUILTY PLEA, AND THEN I THINK WE  
7 HAVE TO RENEW THE WHOLE PROCESS.

8 MR. BLAYLOCK, DO YOU HAVE ANYTHING TO SAY WITH  
9 REGARDS TO THIS?

10 MR. BLAYLOCK: ABOUT THE ONLY THING I  
11 COULD SAY, YOUR HONOR, I THINK WE'LL SUBMIT IT ON THE  
12 90-DAY EVALUATION WITH THE RECOMMENDATION.

13 MS. CARTER: YOUR HONOR, LET ME RAISE  
14 THIS THEN AS A LEGAL ISSUE FOR THE COURT TO RULE ON.

15 I AM CONCERNED ABOUT THE INFORMATION THE COURT  
16 IS RECEIVING AS TO CIRCUMSTANCES THAT DO NOT RELATE TO A  
17 BURGLARY CHARGE. NOW, I REALIZE THAT THEY MAY FALL UNDER  
18 A CATAGORY OF THE TOTAL CIRCUMSTANCES OF WHAT OCCURRED, BUT  
19 I AM CONCERNED ABOUT THE COURT RECEIVING REALLY HEARSAY  
20 STATEMENTS FROM THE COUNTY ATTORNEY'S OFFICE AS TO OTHER  
21 ALLEGATIONS OF MISCONDUCT THAT CASEY DID NOT PLEAD TO, AND  
22 THEN CONSIDERING THOSE IN TERMS OF SENTENCING. THAT IS  
23 CLEARLY WHAT THE 90-DAY EVALUATION PEOPLE DID AS WELL.

24 SO, I WOULD RAISE THAT TO THE COURT. I'M NOT  
25 QUITE SURE HOW TO COUCH IT, BUT IT SEEMS TO ME THAT IT IS NOT

1 REALLY POSSIBLE FOR US EXCEPT TO VERBALLY NOW REBUT ANY OF  
2 THAT OR STATE WHAT CASEY RECALLS HAPPENING. SO, I WOULD  
3 RAISE THAT AS AN ISSUE TO THE COURT.

4 THE COURT: DO YOU HAVE ANYTHING TO SAY  
5 IN RESPONSE TO THAT, MR. BLAYLOCK?

6 MR. BLAYLOCK: I THINK THAT THE STATUTE  
7 IS CLEAR, AND ALSO THE CASES, THAT THE COURT CAN CONSIDER  
8 EXTRANEOUS EVIDENCE THAT WOULDN'T BE PERMISSIBLE IN A TRIAL  
9 AT THE TIME OF SENTENCING, AND THAT IT CAN ALSO LOOK AT  
10 BACKGROUND AND CIRCUMSTANCES SURROUNDING THE OFFENSE AND  
11 THE MANNER IN WHICH THE OFFENSE IS COMMITTED, THE ATTITUDE  
12 OF THE DEFENDANT AND SO FORTH.

13 I THINK THOSE ARE BASICALLY WHAT THE PRE-  
14 SENTENCE PEOPLE DO, THE 90-DAY EVALUATION ADDRESSES. SO,  
15 I THINK THOSE ARE ALL APPROPRIATE COMMENTS TO THE COURT AND  
16 THEY PUT THE COURT IN THE PICTURE AS TO WHAT THE COMPLETE  
17 CIRCUMSTANCES WERE.

18 I DON'T THINK THE FACT THAT AN INDIVIDUAL PLEADS  
19 TO A SPECIFIC COUNT, IF WHETHER IT'S THE POLICE OR VICTIM OR  
20 ANYBODY THAT IS FAMILIAR WITH THE VICTIM MAKING THAT KIND  
21 OF A STATEMENT -- PARTICULARLY IN LIGHT OF THE RECENT  
22 LEGISLATIVE ACTS THAT SPEAK TO THINGS LIKE VICTIM IMPACT  
23 STATEMENTS, THINGS OF THAT NATURE. THOSE ARE VERY IMPORTANT  
24 FOR THE SENTENCING JUDGE TO UNDERSTAND, THE KINDS OF IMPACT  
25 THAT A CRIME HAS HAD ON A VICTIM.



1                    THAT SPECIFICALLY IS WHAT WE ARE LOOKING AT  
2                    HERE, AND I BELIEVE THAT SPECIFICALLY IS WHAT COUNSEL IS  
3                    TALKING ABOUT. HE ENTERED A PLEA TO A SECOND DEGREE FELONY,  
4                    BUT WHAT OCCURRED HAD A MUCH GREATER IMPACT ON THE VICTIM  
5                    BECAUSE THERE WERE OTHER THINGS INVOLVED. I THINK IT WAS  
6                    ALL APPROPRIATE AND ALL THE COMMENTS IN THE EVALUATION ARE  
7                    APPROPRIATE. I THINK THEY'RE APPROPRIATE FOR THIS COURT TO  
8                    REVIEW IN DETERMINING A SENTENCE FOR THE CRIME, AND THE  
9                    RECOMMENDATION MADE BY THE 90-DAY EVALUATION UNIT IS  
10                   APPROPRIATE.

11                   MS. CARTER: YOUR HONOR, I WILL SUBMIT  
12                   THE LEGAL ISSUE, BUT WE DO HAVE FURTHER COMMENTS.

13                   THE COURT: WELL, I WILL THINK ABOUT IT.  
14                   YOU MAY GO AHEAD AND MAKE YOUR OTHER COMMENTS.

15                   MS. CARTER: WHAT I WOULD SAY, AND I  
16                   SAID A LOT OF THIS LAST WEEK SO I WON'T BE TOO REPETITIOUS,  
17                   IS THAT CASEY DID NOT FAIR WELL ON THE 90-DAY. THE 90-DAY  
18                   IS SORT OF A LAST CHANCE EFFORT, AND I REALIZE THAT, BUT I  
19                   THINK SOME OF WHAT OCCURRED DURING THE 90-DAY WAS THAT  
20                   AP&P RECEIVED THIS EXTRA INFORMATION. CASEY HAS A SEVERE  
21                   SUBSTANCE ABUSE PROBLEM, YOUR HONOR, AND THAT HAS BEEN MY  
22                   BIGGEST CONCERN ALL ALONG.

23                   I THINK CASEY NEEDS HELP WITH THAT AND I'M NOT  
24                   SURE HE WILL GET THAT KIND OF HELP AT THE PRISON. THAT IS,  
25                   TO ME, THE ROOT OF WHAT THE PROBLEM IS. WHATEVER DID OCCUR,

1 I THINK THAT IS WHAT TRIGGERS THIS ACTIVITY BY CASEY,  
2 WHETHER IT'S A BURGLARY OR ANYTHING ELSE, AND I THINK THAT  
3 HE NEEDS HELP WITH THAT.

4 CASEY REMEMBERS GOING THERE, GOING IN, AND HE  
5 REMEMBERS WHEN HE USED THE TELEPHONE. HE DOES NOT BELIEVE  
6 THAT HE DID ANY OF THE SEXUAL MISCONDUCT THAT HAS BEEN  
7 ALLUDED TO IN THE PRESENTENCE REPORT. HE FEELS BADLY ABOUT  
8 WHAT HE DID. HE IS NOT TRYING TO EXCUSE GOING IN THERE.  
9 THAT WAS WRONG. HE REALIZES THAT THE VICTIM WAS VERY MUCH  
10 TERRORIZED BY HIS GOING IN THERE AND THAT THAT CAN'T BE  
11 TOLERATED AND THAT IT WAS WRONG OF HIM TO DO THAT; BUT  
12 CASEY DOES HAVE A SUBSTANCE ABUSE PROBLEM. HE WOULD NOT  
13 HAVE GONE THERE, YOUR HONOR, IF HE HAD NOT BEEN VERY DRUNK.

14 I WOULD URGE THE COURT TO CONSIDER ANYTHING  
15 BESIDES PRISON THAT WOULD DEAL WITH THE PROBLEM.

16 I THINK MAYBE CASEY WOULD LIKE TO SAY SOMETHING  
17 TO THE COURT.

18 THE DEFENDANT: I WOULD LIKE TO GET  
19 ALCOHOL TREATMENT, YOUR HONOR. I KNOW THAT THAT WOULD  
20 NEVER HAVE HAPPENED IF I WOULDN'T HAVE BEEN DRINKING. I  
21 KNOW I SHOULDN'T HAVE BEEN DRINKING, BUT I DID, AND I WENT  
22 TO THE HOUSE TO USE THE TELEPHONE -- ALL MY INTENT TO DO,  
23 AND I'M VERY SORRY FOR WHAT HAPPENED. NOT BECAUSE I GOT  
24 CAUGHT, I'M JUST SORRY FOR WHAT HAPPENED.

25 THE COURT: DO YOU HAVE ANYTHING FURTHER?

1 MS. CARTER: NO, YOUR HONOR. WE WOULD  
2 SUBMIT IT.

3 THE COURT: WELL, TAKING ALL OF THE  
4 CONSIDERATIONS, TAKING EVERYTHING INTO CONSIDERATION I DON'T  
5 SEE ANY LEGAL REASON WHY SENTENCE CANNOT BE IMPOSED AT THIS  
6 TIME. THEREFORE, I'M GOING TO IMPOSE SENTENCE AS FOLLOWS:

7 YOU WILL BE CONFINED IN UTAH STATE PRISON FOR  
8 AN INDETERMINATE ONE TO FIFTEEN YEARS, AND IT IS GOING TO  
9 BE THE FURTHER RECOMMENDATION OF THIS COURT THAT THE PRISON  
10 ALLOW YOU TO TAKE WHATEVER MEANS THAT THEY HAVE THERE TO  
11 RESOLVE YOUR DRUG PROBLEM, IF THEY HAVE IT. IF NOT, THEN  
12 I DON'T KNOW WHAT MORE I CAN DO IN YOUR BEHALF.

13 I WOULD LIKE TO HELP YOU OUT, BUT ON THE OTHER  
14 HAND I'M SURE WITH YOUR PROBLEM THAT YOU SHOULDN'T BE OUT  
15 ON THE STREETS EITHER AT THIS TIME.

16 SO THAT RECOMMENDATION WILL BE MADE TO THE  
17 PRISON AUTHORITIES, THAT THEY PLACE YOU IN SOME TYPE OF DRUG  
18 REHABILITATION PROGRAM WHILE YOU'RE OUT THERE AT THE PRISON.  
19 I THINK THAT CAN POSSIBLY BE DONE. SO THAT WILL BE THE  
20 SENTENCE AT THIS TIME.

21 FURTHER SENTENCE, I FAILED TO MENTION THAT THERE  
22 IS A \$35 RESTITUTION. HE WILL HAVE TO PAY THAT ALSO. THAT  
23 WILL BE THE ORDER OF THE COURT, THAT HE PAY THAT \$35  
24 RESTITUITION TO THE VICTIM.

25 --000--